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Theta Edge Bhd (previously known as Lityan Holdings Bhd) v Infornential Sdn Bhd and another appeal

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(NCVC)(W)-756–05 OF 2015 AND W-02(NCVC)(W)-904–06 OF 2015

PRASAD ABRAHAM, HASNAH HASHIM AND ASMABI MOHAMAD JJCA

C

21 FEBRUARY 2017

Companies and Corporations — Separate legal entity — Lifting veil of incorporation — Principles applicable in lifting corporate veil — Whether companies operated as single commercial entity — Whether actual fraud or inequitable or unconscionable conduct amounting to fraud in equity is a prerequisite — Refusal to lift corporate veil

D

Companies and Corporations — Winding up — Creditor's voluntary winding up — Whether declaration of solvency required — Whether statutory declaration by director declaring that company unable to continue business sufficient — Judgment obtained against wound up company — Whether valid judgment

E

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Appeal No 756 and Appeal No 904 stemmed from one judgment of the High Court. The appellant in Appeal No 756 appealed against the decision of the learned High Court judge ('the judge') allowing the respondent's claim against the appellant. The appellant in Appeal No 904 appealed against the decision of the judge dismissing its claims against the first and second respondents ('the second and fifth defendants'). Lityan Systems Sdn Bhd ('Lityan Systems'), a wholly owned subsidiary of the appellant and the respondent, had entered into a consultancy agreement ('the agreement') with the respondent. The agreement was later terminated by Lityan Systems as a result of which the respondent commenced an action against Lityan Systems ('the Lityan's suit') and obtained judgment ('Lityan judgment'). As the Lityan's judgment remained unsatisfied, the respondent then commenced another action against the appellant and four other defendants ('the other defendants') seeking a declaration that the appellants and the other defendants conspired to act fraudulently against the respondent to deprive the respondent from recovering the judgment against

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Lityan Systems. The respondent alleged that the acts and conduct of Lityan Systems were in fact the acts and conduct of the appellant. As such, the respondent contended that the corporate veil ought to be lifted against the appellant and the appellant ought to be liable to the respondent for the judgment debt owed by Lityan Systems. Lityan Systems was voluntarily wound up on 18 August 2010 pursuant to s 255 of the Companies Act 1965 ('the CA'). At the material time the Lityan's suit was still pending. Despite the fact that Lityan Systems was dissolved on 4 April 2011 the High Court allowed the respondent's application for leave to proceed with the Lityan's suit. The judge allowed the respondent's claim against the appellant and dismissed the respondent's claims against the other defendants. The judge found that the appellant had acted fraudulently to wind up Lityan Systems to deprive the respondent of the proceeds of the Lityan judgment and hence, pierced the corporate veil of the appellant. On the issue of conspiracy, the judge held that the appellant failed to prove the elements of conspiracy against the respondents. The appellant appealed against this decision on the following grounds: (a) the appellant and Lityan Systems did not operate as a single entity; (b) the judge erred in lifting the corporate veil of the appellant on the basis of fraud when the respondent failed to specifically plead the particulars of fraud and also failed to prove any allegation of fraud against the appellant; and (c) the Lityan judgment was obtained by the respondent against a non-existing entity. The appellant also contended that the first respondent had failed to lodge a declaration of solvency as set out as Form 66 in the CA.

Held, allowing the appeal in Appeal No 756 with costs and dismissing the appeal in Appeal No 904 with costs:

(1) Lityan Systems and the appellant were two distinct commercial entities. It could not be reasonably inferred that the two companies had operated as a single commercial entity. There was the absence of any contemporaneous documents emanating from Lityan Systems to confirm that the activities of the two companies were so intertwined that they had operated as a single commercial entity (see para 24).

(2) The corporate veil will be pierced by the aourt only in appropriate circumstances. It is not open to the courts to disregard the corporate veil purely on the ground that it is in the interests of justice to do so. There must be evidence of either actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity (see paras 29 & 32).

(3) The evidence either of actual fraud or conduct amounting to fraud in equity is a non-negotiable prerequisite to justify lifting of the corporate veil. There was insufficient evidence of actual or equitable fraud made out by the respondent against the appellant. There was thus no justification to pierce the corporate veil of the appellant (see para 34).

(4) The judgment was entered against a company that was dissolved. However, since the judgment was not set aside neither was there any application made pursuant to s 307 of the CA, the judgment obtained remained valid and enforceable (see para 36).

(5) In the tort of conspiracy there must be an agreement or 'combination' of two or more with the common intention to effect an unlawful purpose or to do a lawful act by unlawful means, resulting in damage. The first respondent was acting on behalf of Thetha Edge Bhd whereas the second respondent was merely discharging his duties and responsibilities as provisional liquidator. On the totality of the evidence, there was insufficient evidence of actual or equitable fraud made out. Accordingly, the claim for conspiracy to defraud failed (see paras 37–38).

(6) Lityan Systems was wound up by way of a creditor's voluntary winding up pursuant to s 255 of the CA. No declaration of solvency is required for that purpose. The directors of Lityan Systems had affirmed a statutory declaration in Form 65A to declare that the company could not continue its business. Furthermore, the first respondent was not even a director of Lityan Systems. Accordingly, the first respondent did not breach any statutory duty to the appellant in the winding up process of Lityan Systems (see para 40).

[Bahasa Malaysia summary

Rayuan 756 dan 904 timbul berikutan satu penghakiman Mahkamah Tinggi. Perayu dalam Rayuan No 756 merayu terhadap keputusan hakim Mahkamah Tinggi ('hakim') yang membenarkan tuntutan responden terhadap perayu. Perayu dalam Rayuan No 904 merayu terhadap keputusan hakim menolak tuntutan-tuntutannya terhadap responden pertama dan kedua ('defendan kedua dan kelima') Lityan Systems Sdn Bhd ('Lityan Systems'), sebuah subsidiari yang dimiliki sepenuhnya oleh perayu dan responden, memasuki perjanjian rundingan ('perjanjian') dengan responden. Perjanjian tersebut ditamatkan oleh Lityan Systems dan akibatnya, responden memulakan tindakan terhadap Lityan Systems ('guaman Lityan'). Oleh kerana penghakiman Lityan kekal tidak dipenuhi, responden memulakan satu lagi tindakan terhadap perayu dan empat lagi defendan ('defendan-defendan lain'), memohon deklarasi bahawa perayu-perayu dan defendan-defendan lain bersubahat untuk bertindak secara penipuan terhadap responden untuk menafikan responden daripada memperoleh penghakiman terhadap Lityan Systems. Responden mendakwa bahawa tindakan dan kelakuan Lityan Systems sebenarnya tindakan dan kelakuan perayu. Oleh itu, responden menghujahkan bahawa tabir korporat perayu sewajarnya disingkap dan perayu sepatutnya bertanggungan terhadap responden bagi hutang penghakiman yang terhutang oleh Lityan Systems. Lityan Systems digulung pada 18 Ogos 2010 berikutan s 255 Akta Syarikat 1965 ('AS'). Pada masa material, guaman Lityan masih berjalan. Walaupun Lityan Systems dibubarkan pada 4 April

2011, Mahkamah Tinggi membenarkan permohonan responden untuk mendapat kebenaran untuk meneruskan dengan guaman Lityan. Hakim membenarkan tuntutan responden terhadap perayu dan menolak tuntutan-tuntutan responden terhadap defendan-defendan lain. Hakim mendapati bahawa perayu sebenarnya bertindak menipu untuk menggulung Lityan Systems untuk menafikan responden hasil bersih penghakiman Lityan dan oleh itu, menyingkap tabir korporat perayu. Bagi isu konspirasi, hakim memutuskan bahawa perayu gagal membuktikan elemen-elemen konspirasi terhadap responden-responden. Perayu merayu terhadap keputusan ini atas alasan: (a) perayu dan Lityan Systems tidak bertindak sebagai entiti tunggal; (b) hakim terkhilaf apabila beliau menyingkap tabir korporat perayu atas alasan penipuan sedangkan responden gagal memplidkan butiran penipuan dan gagal membuktikan dakwaan penipuan terhadap perayu; dan (c) penghakiman Lityan diperoleh oleh responden terhadap entiti yang tidak wujud. Perayu juga menghujahkan bahawa responden pertama gagal membuat deklarasi solvensi seperti dalam Borang 66 AS.

Diputuskan, membenaran rayuan dalam Rayuan No 756 dengan kos dan menolak rayuan dalam Rayuan No 904 dengan kos:

(1) Lityan Systems dan perayu adalah dua entiti komersial berbeza. Tidak boleh disimpulkan dengan munasabah bahawa dua syarikat tersebut beroperasi sebagai entiti komersial tunggal. Tidak wujud dokumen semasa yang timbul dari Lityan Systems untuk mengesahkan bahawa aktiviti-aktiviti kedua-dua syarikat saling bersangkutan hinggakan keduanya beroperasi sebagai entiti komersial tunggal (lihat perenggan 24).

(2) Tabir korporat akan disingkap oleh mahkamah dalam hal-hal keadaan yang sesuai. Tidak terbuka kepada mahkamah untutk mengetepikan tabir korporat semata-mata atas alasan tiada kepentingan keadilan untuk berbuat demikian. Tiada keterangan atau penipuan sebenar bawah common law atau mana-mana tindakan tidak berekuiti atau tidak berpatutan yang terjumlah kepada penipuan dalam ekuiti (lihat perenggan 29 & 32).

(3) Keterangan penipuan sebenar atau tindakan yang terjumlah kepada penipuan dalam ekuiti adalah syarat tidak boleh dirunding untuk menyingkap tabir korporat. Tiada keterangan yang cukup bagi penipuan sebenar atau berekuiti yang dibuktikan oleh responden terhadap perayu. Oleh itu, tiada justifikasi untuk menyingkap tabir korporat perayu (lihat perenggan 34).

(4) Penghakiman dimasukkan terhadap syarikat yang dibubarkan. Walau bagaimanapun, memandangkan penghakiman tersebut tidak diketepikan mahupun terdapat permohonan untuk dibuat bahawa s 307

AS, pengakiman yang diperoleh kekal sah dan berkuatkuasa (lihat perenggan 36).

(5) Dalam tort konspirasi, mesti terdapat perjanjian atau kombinasi dua atau lebih niat bersama untuk memberi efek pada tujuan tidak sah atau untuk membuat tindakan sah melalui cara tidak sah, menyebab kerugian. Responden pertama bertindak bagi pihak Thetha Edge Bhd manakala responden kedua sekadar melepaskan tanggungjawab dan kewajipannya sebagai likuidator bersyarat. Berdasarkan keseluruhan keterangan, tiada keterangan yang cukup untuk membuktikan penipuan sebenar atau berekuiti. Oleh itu, tuntutan konspirasi menipu gagal (lihat perenggan 37–38).

(6) Lityan Systems digulung melalui penggulungan sukarela kreditor bawah s 255 AS. Tiada deklarasi solvensi yang diperlukan bagi tujuan ini. Pengarah-pengarah Lityan Systems telah mengesahkan akuan statutori dalam Borang 65A untuk mengisytiharkan syarikat tidak boleh meneruskan perniagaannya. Tambahan lagi, responden pertama bukan pengarah Lityan Systems. Oleh itu, responden pertama tidak melanggar apa-apa kewajipan statutori terhadap perayu dalam proses penggulungan Lityan Systems (lihat perenggan 40).]

Notes

For cases on lifting veil of incorporation, see 3(1) *Mallal's Digest* (5th Ed, 2015) paras 992–1024.

For cases on creditor's voluntary winding up, see 3(1) *Mallal's Digest* (5th Ed, 2015) paras 1318–1320.

For cases on conspiracy in general, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 74–130.

Cases referred to

Abdul Aziz bin Atan & 87 Ors v Ladang Rengo Malay Estate Sdn Bhd [1985] 2 MLJ 165; [1985] 1 CLJ 255; [1985] CLJ Rep 370 (refd)

Adams v Cape Industries plc [1990] Ch 433, Ch D (refd)

Aspatra Sdn Bhd & 21 Ors v Bank Bumiputra Malaysia Bhd & Anor [1988] 1 MLJ 97; [1987] 2 CLJ 377; [1987] CLJ Rep 50, SC (refd)

DHN Food Distributors Ltd v Tower Hamlets London Borough Council [1976] 1 WLR 852, CA (refd)

Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals [2015] 1 MLJ 773; [2015] 1 CLJ 719, FC (refd)

Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor [1980] 1 MLJ 109; [1979] 1 LNS 32 (refd)

Law Kam Loy & Anor v Boltex Sdn Bhd & Ors [2005] MLJU 225; [2005] 3 CLJ 355, CA (refd)

A *Mackt Logistics (M) Sdn Bhd v Malaysian Airline System Bhd* [2014] 2 MLJ 518; [2014] 5 CLJ 851, CA (refd)
Solid Investments Ltd v Alcatel-Lucent (M) Sdn Bhd (previously known as Alcatel Network Systems (M) Sdn Bhd) [2014] 3 MLJ 785; [2014] 3 CLJ 73, FC (refd)
B *Yap JH v Tan Sri Loh Boon Siew & Ors* [1991] 4 CLJ Rep 243, HC (refd)

Legislation referred to

Companies Act 1965 ss 255, 257(1), 307, 307(1), Forms 66, 65A
Industrial Relations Act 1967
C

Appeal from: Civil Suit No 22NCVC-558–05 of 2012 (High Court, Kuala Lumpur)

Harjinder Kaur (Shahrizat Rashid & Lee) in Appeal No W-02(NCVC)(W)-756–05 of 2015 for the appellant.
D *Colin Andrew Pereira (Goh Wong Pereira) in Appeal No W-02(NCVC)(W)-904–06 of 2015 for the appellant.*
Colin Andrew Pereira (Goh Wong Pereira) in Appeal No W-02(NCVC)(W)-756–05 of 2015 for the respondent.
E *Harjinder Kaur (Shahrizat Rashid & Lee) in Appeal No W-02(NCVC)(W)-904–06 of 2015 for the first respondent.*
(Farah A Zabir & Partners) in Appeal No W-02(NCVC)(W)-904–06 of 2015 for the second respondent.

F **Hasnah Hashim JCA:**

INTRODUCTION

[1] Before us are two appeals, namely, (W-02(NCVC)(W)-756–05 of
G 2015) ('Appeal No 756') and W-02(NCVC)(W)-904–06 of 2015 ('Appeal No 904') stemming from one judgment of the High Court at Kuala Lumpur. With the consent of respective counsel both appeals were heard together as they are based on the same factual matrix and issues. The appellant in Appeal No 756 appealed against the decision of the learned High Court judge on 27 April
H 2015 allowing the respondent's claim with costs of RM15,000 against the appellant. The appellant in Appeal No 904 appealed against the decision of the learned High Court judge dismissing its claims against the first and second respondents ('the second and fifth defendants respectively').

I MATERIAL FACTS

[2] Lityan Systems Sdn Bhd ('Lityan Systems'), a wholly owned subsidiary of the appellant and the respondent entered into a consultancy agreement dated 8 January 2002 ('the consultancy agreement'). Under the said

consultancy agreement the respondent was to provide financial consultancy services to Lityan Systems and its group of companies for a term of three years commencing from 1 January 2002. However, the consultancy agreement was terminated by Lityan Systems on 1 January 2003. The respondent and Lityan Systems attempted to negotiate settlement but failed to reach any agreement to settle. As a result the respondent commenced an action against Lityan Systems in the Kuala Lumpur High Court vide Civil Suit No S1–22–1665 of 2004 ('the Lityan's suit').

[3] The respondent obtained judgment against Lityan Systems on 12 May 2011 ('Lityan's judgment'). As the Lityan's judgment remained unsatisfied, the respondent then commenced an action against the appellant and four other defendants ('the other defendants') in the High Court of Malaya in Kuala Lumpur vide Civil Suit No 22NCVC-558–05 of 2012. In the action in the High Court the respondent sought a declaration that the appellants and the other defendants conspired to act fraudulently against the respondent to deprive the respondent from recovering the judgment against Lityan Systems. It was alleged by the respondent that the acts and conduct of Lityan Systems were in fact the acts and conduct of the appellant. Under the circumstances the respondent contended that the corporate veil ought to be lifted against the appellant and the appellant ought to be liable to the respondent for the judgment debt owed by Lityan Systems under the Lityan's judgment. The respondent claimed damages in the sum of of RM2,105,585.23 (*being the amount outstanding under the Lityan's judgment*), aggravated and or exemplary damages and interest.

[4] Lityan Systems was voluntarily wound up on 18 August 2010 pursuant to s 255 of the Companies Act 1965 ('the CA'). At the material time the Lityan's Suit was still pending and not been set down for trial.

[5] Following the winding up of Lityan Systems, the respondent filed its proof of debt ('POD') on 26 October 2011. The POD was admitted by the liquidator. Despite having filed the POD the respondent proceeded to seek leave of the High Court to proceed with the Lityan's suit vide a summons in chambers dated 25 February 2011. Lityan Systems was subsequently dissolved by the High Court on 4 April 2011.

[6] Despite the fact that Lityan Systems was dissolved on 4 April 2011 the High Court allowed the respondent's application to proceed against Lityan Systems and granted leave to proceed with the Lityan's suit.

[7] On 27 April 2015 the learned High Court judge allowed the respondent's claim with costs against the appellant and dismissed the respondent's claims against the other defendants.

[8] Dissatisfied with the High Court judgment in allowing the respondent's claim against the appellant, the appellant lodged this appeal.

FINDINGS OF THE HIGH COURT

[9] The learned High Court judge allowed the respondent's claim against the appellant on the following basis:

(a) the corporate veil of the appellant ought to be lifted as the appellant and Lityan Systems had acted as a single commercial entity and as one concern;

(b) the appellant controlled the movement of its subsidiaries which included Lityan Systems;

(c) the potential liability of the appellant to the respondent in respect of the dispute between Lityan Systems and the respondent as well as the proposed settlement in relation to the said dispute was discussed in the appellant's board of directors' meetings thus evidencing that the appellant and Lityan Systems operated as a single commercial entity;

(d) the fact that the appellant and Lityan Systems were treated as a single entity was also evident in the preparation of the appellant's accounts and management structure;

(e) the appellant recognised the Lityan's suit as its possible obligation in the consolidated annual reports and financial statements of the appellant;

(f) the appellant through its managing director negotiated a settlement with the respondent in relation to the debt owing by Lityan Systems and thus, evidencing that the appellant and Lityan Systems operated as one single entity;

(g) the appellant was in complete control of Lityan System and the termination of the consultancy agreement between the respondent and Lityan Systems was as at the direction of the appellant;

(h) the corporate veil of the appellant ought to be lifted on the basis that the appellant had acted fraudulently to wind up Lityan Systems to deprive the respondent of the proceeds of any judgment that the respondent would have obtained against Lityan Systems;

(i) the appointment of the third and fourth defendants as directors of Lityan Systems was for the sole purpose of winding up Lityan Systems and to carry out the instructions of the appellant to wind up Lityan Systems;

(j) the intention in winding up Lityan Systems under s 255 of the CA was to ensure that the Lityan suit will not proceed further;

(k) the question whether the counsel for the respondent had misrepresented to the High Court on the status of Lityan Systems in that it had been dissolved at the hearing of the respondent's application for leave to proceed with the Lityan suit or at the time when the Lityan's judgment was obtained is a non-issue; and

(l) the question whether the filing of the proof of debt by the respondent extinguished the respondent's claim against Lityan Systems as the Lityan's judgment was not set aside is a non-issue.

ISSUES RAISED BY THE APPELLANT

[10] Learned counsel for the appellant raised three main issues in this appeal:

(a) the appellant and Lityan Systems did not operate as a single entity;

(b) the learned High Court judge erred on facts and in law in lifting the corporate veil of the appellant on the basis of fraud when the respondent failed to specifically plead the particulars of fraud and also failed to prove any allegation of fraud against the appellant. The learned High Court judge erred on facts and in law in holding that the winding up Lityan Systems was in fact engineered by the appellant to deprive the respondent of the Lityan judgment; and

(c) the Lityan judgment was obtained by the respondent against a non-existing entity.

THE APPELLANT'S SUBMISSION

[11] Learned counsel for the appellant submitted that even though the consultancy agreement was entered between Lityan Systems and the respondent to provide consultancy services to the Lityan Group of companies it does not necessarily mean that the appellant and Lityan System operated as a single entity. The managing director of the appellant did not deny that the meeting was held on 18 April 2008 was to discuss settlement of the respondent's claim. However, the attempt to settle or negotiate on behalf of Lityan Systems does not necessarily mean that Lityan Systems and the appellant operated as a single entity.

[12] It was also argued that if at all it should have been the corporate veil of Lityan Systems that ought to be lifted and not that of the appellant. Furthermore, in its pleading the respondent did not particularise the fraud but had merely stated that the voluntarily winding up of Lityan System was to fraudulently deprive the respondent of the Lityan judgment.

[13] In his submission learned counsel for the appellant highlighted that the respondent during the trial at the High Court appeared to have abandoned the issue of fraud. The only evidence led in the High Court to justify the lifting of the corporate veil was in respect of the appellant and Lityan Systems operating as a single commercial entity. Learned counsel for the appellant further submitted that the High Court judge had misdirected herself on this issue and failed to appreciate that the respondent did not raise fraud in its pleadings.

[14] It was further submitted by learned counsel for the appellant that the respondent failed to name Lityan Systems as a party to the present action and also failed to specifically plead that the corporate veil of Lityan Systems ought to be lifted.

[15] Learned counsel for the appellant argued that the Lityan judgment was obtained by the respondent against a non-existing entity as Lityan Systems was dissolved on 4 April 2011. Despite the fact that Lityan Systems was dissolved the High Court had allowed the respondent's application for leave to proceed against Lityan Systems on 7 April 2011 and subsequently judgment was entered on 12 May 2011.

[16] Since Lityan Systems was dissolved on 4 April 2011 the respondent cannot file an action against it. The dissolution of Lityan Systems would in effect means that it no longer possessed any legal personality and status to sue and be sued. Lityan Systems therefore cannot file any action. Neither can it be sued.

[17] The appellant submitted that the respondent should have instead applied for a declaration that the dissolution of Lityan Systems was void and to reinstate it to its former status before initiating an action against the appellant pursuant to s 307(1) of the CA. The failure of the respondent to make such an application is therefore fatal as the judgment obtained was against a non-existing entity.

THE RESPONDENT'S SUBMISSION

[18] Learned counsel for the respondent submitted that the corporate veil may be lifted whenever the interest of justice requires. There is no requirement to establish fraud. Furthermore, the High Court had found that there was ample evidence to show that the appellant could control every movement of its subsidiaries including Lityan Systems. The potential liability of the appellant was discussed at the board of the appellant which had resulted in the preparation of the proposed settlement by the appellant. As no witness was called by the appellant to contradict PW1's testimony that the appellant and Lityan Systems operated as a single entity his evidence remained unchallenged.

OUR DECISION

Whether Lityan Systems and the appellant operated as a single entity

[19] The respondent had initiated the action against the appellant and the four other defendants premised on the allegation that they had conspired to act fraudulently against the respondent by voluntarily winding up Lityan Systems. The respondent contended that since the appellant was the alter ego and the directing will and mind of Lityan Systems the corporate veil of the appellant ought to be lifted so that they could be held liable for the judgment sum. It was argued by the respondent that the winding up of Lityan Systems was crafted by the appellant to avoid payments to creditors thus depriving the respondent of the judgment sum.

[20] The learned High Court judge found that there were sufficient evidence to show that the appellant had controlled the activities of its subsidiaries which included Lityan Systems. PW1, a director and shareholder of both Lityan Systems and the appellant was familiar with the affairs of both Lityan Systems and that of the appellant. In his testimony he had confirmed that Lityan Systems and the appellant had operated as a single entity.

[21] The only witness for the appellant was Nor Badli Munawir bin Mohamad Alias Lafti ('DW1') who was a director of the appellant and had signed the resolution to wind up Lityan Systems. He told the court that as the managing director of the appellant he had the authority to negotiate settlement with the respondent.

[22] Her Ladyship had relied wholly on the oral evidence of PW1 to come to the conclusion that the appellant and Lityan Systems had operated as a single company since the evidence of PW1 went unchallenged. Furthermore, the potential liability of the appellant with regards to Lityan Systems' debts were discussed many times at the appellant's board meetings. She was of the considered view that the appellant and Lityan Systems were in fact a single commercial entity because the reports and financial statement of the appellant had acknowledged the claim of the respondent. The learned High Court judge was of the considered view that since the managing director of the appellant was willing to meet PW1 to negotiate a settlement in respect of the debt owing it is evident that the two companies operated as one single entity.

[23] A company is an entity separate from its shareholders and that a subsidiary and its parent or holding company are separate entities having separate existence. In *Abdul Aziz bin Atan & 87 Ors v Ladang Rengo Malay Estate Sdn Bhd* [1985] 2 MLJ 165; [1985] 1 CLJ 255; [1985] CLJ Rep 370 the court held that an incorporated company was a legal person separate and

A distinct from the shareholders of the company. Shankar J had this to say:

> It is trite law that an incorporated company is a legal person separate and distinct from the shareholders of the company. The company from the date of incorporation has perpetual succession and the Companies Act provides that the liability on the part of the shareholders to contribute to the assets of the company will be limited in the manner provided by law and its memorandum and articles of association. The whole point of forming a limited company is that the shareholders can have in their hands the management of the business without incurring the risk of being under unlimited liability for the debts of the company.

[24] In the appeal before us Lityan Systems and the appellant are two distinct commercial entities. We are not persuaded that it could be reasonably inferred that the two companies had operated as a single commercial entity even though PW1's evidence was not rebutted or challenged. There was the absence of any contemporaneous documents emanating from Lityan Systems to confirm that the activities of the two companies were so intertwined that they had operated as a single commercial entity. It appeared to us based on the facts and the evidence the learned judge had, with respect, erred in accepting in its entirety the evidence of PW1.

Lifting of the corporate veil

[25] Her Ladyship considered and applied the case of *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* [1976] 1 WLR 852 where Lord Denning the Master of the Rolls said:

> Third, lifting the corporate veil. A further very interesting point was raised by counsel for the claimants on company law. We all know that in many respects a group of companies are treated together for the purpose of general accounts, balance sheet and profit and loss account. They are treated as one concern. Professor Gower in his book on company law says: 'there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group'. This is especially the case when a parent company owns all the shares of the subsidiaries, so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says. A striking instance is the decision of the House of Lords in *Harold Holdworth & Co (Wakefield) Ltd v Caddies* [1955] 1 All ER 725. So here. This group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point. They should not be deprived of the compensation which should justly be payable for disturbance. The three companies should, for present purposes, be treated as one, and the parent company, DHN, should be treated as that one. So that DHN are entitled to claim compensation accordingly. It was not necessary for them to go through a conveyancing device to get it.

[26] The learned High Court judge concluded that the appellant had acted fraudulently to wind up Lityan Systems to deprive the respondent of the proceeds of the judgment it had obtained against Lityan Systems. Therefore, it was not wrong in law to pierce the corporate veil of the appellant.

[27] Walter Woon in his book *'Company Law'* (2nd Ed) at p 52, stated that:

> The only justification for lifting the veil of incorporation is that the company is in fact not a separate entity. This requires evidence. If the evidence does not establish that the company is run as a mere extension of its controllers' affair, the veil of incorporation should remain firmly in place. However, if it can be proven that the company is in fact not a separate entity from its controllers, a court might be persuaded to lift the veil in the appropriate circumstances.

[28] The Supreme Court in *Aspatra Sdn Bhd & 21 Ors v Bank Bumiputra Malaysia Bhd & Anor* [1988] 1 MLJ 97; [1987] 2 CLJ 377; [1987] CLJ Rep 50 held:

> ... the court would generally lift the corporate veil in order to do justice particularly when an element of fraud is involved although the consequences of lifting the veil would vary according to the circumstances of each case.

[29] The corporate veil will be pierced by the court only in appropriate circumstances. In the case of *Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1980] 1 MLJ 109; [1979] 1 LNS 32 (HC) the court lifted the veil of incorporation on the facts of that case because it concerned the Industrial Relations Act 1967 where the Industrial Court was required to disregard technicalities and to take into account the rules of equity, good conscience and the merits of the case.

[30] Justice Abdul Malik Ishak JCA in the case of *Mackt Logistics (M) Sdn Bhd v Malaysian Airline System Bhd* [2014] 2 MLJ 518; [2014] 5 CLJ 851 in his judgment succinctly explained:

> Once a company is incorporated, a veil is cast over the true controllers of the company, through which the law will not usually penetrate. There was no standard principle to guide the courts in piercing the corporate veil. However, there are statutory as well as common law exceptions to the principle enunciated in *Salomon v Salomon & Co*, and once a case comes within one of the exceptions, the courts may lift the veil of incorporation. In piercing the corporate veil, the facts of the case must be examined and it must be clearly pleaded that the veil should be lifted.

[31] Gopal Sri Ram JCA (later FCJ) in *Law Kam Loy & Anor v Boltex Sdn Bhd & Ors* [2005] MLJU 225; [2005] 3 CLJ 355 (CA), aptly said at p 362:

> In my judgment, in the light of the more recent authorities such as *Adams v Cape Industries Plc* [1990] Ch 433, it is not open to the courts to disregard the corporate

A veil purely on the ground that it is in the interests of justice to do so. It is also my respectful view that the special circumstances to which Lord Keith referred include cases where there is either actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity.

B **[32]** In the *Law Kam Loy*'s case His Lordship discussed at length the *DHN*'s case and was of the view that in the light of authorities such as *Adams v Cape Industries plc* [1990] Ch 433 it is not open to the courts to disregard the corporate veil purely on the ground that it is in the interests of justice to do so. There must be evidence of either actual fraud at common law or some
C inequitable or unconscionable conduct amounting to fraud in equity.

[33] In the Federal Court decision of *Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213*
D *sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals* [2015] 1 MLJ 773; [2015] 1 CLJ 719 it was held:

[96] But in the event that we should, we are of the view that it is now a settled law in Malaysia that the court would lift the corporate veil of a corporation if such
E corporation was set up for fraudulent purposes, or where it was established to avoid an existing obligation or even to prevent the abuse of a corporate legal personality.

[97] As to what constitutes fraudulent purposes it has been described as to include actual fraud or fraud in equity. And fraud in equity occurred in '... cases where there
F are signs of separate personalities of companies being used to enable persons to evade their contractual obligations or duties, the court would disregard the notional separateness of the companies ...'.

[34] Apart from the subsequent oral evidence of PW1 there was no other
G cogent evidence to support the application of the doctrine. The evidence either of actual fraud or conduct amounting to fraud in equity is a non-negotiable prerequisite to justify lifting of the corporate veil. Having said that we have directed our minds to the case in its entirety and found that there was insufficient evidence of actual or equitable fraud made out by the respondent
H against the appellant. We have not been convincingly persuaded that there is any justification to pierce the corporate veil of the appellant. The Federal Court in *Solid Investments Ltd v Alcatel-Lucent (M) Sdn Bhd (previously known as Alcatel Network Systems (M) Sdn Bhd)* [2014] 3 MLJ 785; [2014] 3 CLJ 73 held:

I (2) The Appellant and Respondent were not in a fiduciary relationship and there was no fiduciary duty to account. There was no relationship of trust and confidence between the parties. The trial court erred in lifting the Respondent's corporate veil to find that the Respondent was bound by the consultancy agreements and liable to

account to the Appellant. There had to be evidence either of actual fraud or some conduct amounting to fraud in equity to justify the lifting of the corporate veil. (paras 45, 46, 48 & 49).

[35] Based on the reasons mentioned above we are of the view that the learned judge had misdirected herself on the principle of law pertaining to the lifting of the corporate veil.

Existing entity

[36] We agree with learned counsel for the appellant that the judgment was entered against a company that was dissolved. However, since the judgment was not set aside neither was there any application made pursuant to s 307 of the CA the judgment obtained remains valid and enforceable.

APPEAL NO 904

Conspiracy

[37] The learned High Court judge had concluded that there was fraud committed against the appellant by the first defendant. However, on the issue of conspiracy Her Ladyship was of the considered view that the appellant failed to prove the elements of conspiracy against the respondents (re: *Yap JH v Tan Sri Loh Boon Siew & Ors* [1991] 4 CLJ Rep 243). In the tort of conspiracy there must be an agreement or 'combination' of two or more with the common intention to effect an unlawful purpose or to do a lawful act by unlawful means, resulting in damage. The first respondent was acting on behalf of Thetha Edge Bhd whereas the second respondent was merely discharging his duties and responsibilities as provisional liquidator.

[38] As we have stated above in Appeal No 756 on the totality of the evidence there was insufficient evidence of actual or equitable fraud made out. Accordingly, the claim for conspiracy to defraud must necessarily fail.

Section 257 of the CA

[39] It is the appellant's submission that the first respondent failed to lodge a declaration of solvency as set out as Form 66 in the CA. Section 257(1) of the CA stipulates:

Where it is proposed to wind up a company voluntarily the directors of the company, or in the case of a company having more than two directors, the majority of the directors may, before the date on which the notices of the meeting at which the resolution for the winding up of the company is to be proposed are sent out, make a written declaration to the effect that they have made an inquiry into the

affairs of the company, and that at a meeting of directors have formed the opinion that the company will be able to pay its debts in full within a period not exceeding twelve months after the commencement of the winding up.

[40] Under the aforesaid section the duty to lodge a written declaration with regards to the solvency of the company lies with the director of the said company. Normally in a voluntary winding up of a company the declaration of solvency would have been lodged pursuant to s 257 of the CA. However, Lityan Systems was wound up by way of a creditor's voluntary winding up pursuant to s 255 of the CA. No declaration of solvency is required for that purpose. The directors of Lityan Systems had affirmed a statutory declaration in Form 65A dated 20 July 2010 to declare that the company could not continue its business. Furthermore, the first respondent is not even a director of Lityan Systems. Accordingly, we of the considered view the first respondent did not breach any statutory duty to the appellant in the winding up process of Lityan Systems.

[41] By an ordinary resolution the second respondent was appointed as the provisional liquidator of Lityan Systems. As the provisional liquidator the second respondent issued a notice of meeting to the creditors including the appellant calling for a meeting of the creditors. On the date of the meeting only seven out of 22 creditors attended and voted for the winding up of Lityan Systems. Lityan Systems owed a total sum of RM27,719,113.92 to the creditors who attended the meeting. Based on the evidence both oral and documentary the second respondent had complied with the provision of the CA in the conduct and administration of the creditor's voluntary winding up of Lityan Systems.

CONCLUSION

[42] For the reasons mentioned above we allow the appeal in Appeal No 756 with costs and set aside the learned judge's decision. We dismiss the appeal in Appeal No 904 with costs to the respondents. We award costs of RM15,000 to the appellant in Appeal No 756 subject to payment of allocator. In Appeal No 904 we award costs of RM15,000 each to the first and second respondents subject to payment of allocator. The deposits of each appeal to be refunded to the respective appellants.

Appeal in Appeal No 756 allowed with costs and appeal in Appeal No 904 dismissed with costs.

Reported by Kanesh Sundrum